The Blindfold on Justice Is Not a Gag: The Case for Allowing Controlled Questioning of Witnesses by Jurors

Sarah E. West
"THE BLINDFOLD ON JUSTICE IS NOT A GAG":
THE CASE FOR ALLOWING CONTROLLED QUESTIONING OF WITNESSES BY JURORS*

I. INTRODUCTION

Imagine for a moment what it is like to be a juror. You have probably not received any training in the law, and you very likely have little familiarity with the subject matter of the action. You may lack understanding of the legal process, other than what you have observed on television. Yet, despite your ignorance of the process, the subject matter of the case, and the law, you are expected to render a decision based on the evidence. The decision made by you and your fellow jurors will determine guilt or innocence, liability or exoneration. Your decision will mark the end of months, perhaps even years, of investigation, negotiation, and strategy by lawyers, the parties, and probably others. What if, in the course of the trial, in the midst of the courtroom's unfamiliarity, you fail to understand the evidence the lawyers have presented to inform your decision? In short, what if you have a question?

At least thirty states and the District of Columbia, with varying degrees of encouragement, permit jurors to question witnesses.1 A handful of states have

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1. See Ariz. R. Civ. P. 39(b)(10) (2001); St. v. Greer, 948 P.2d 995, 997 (Ariz. App. 1997) (finding that carefully controlled juror questioning improves juror comprehension of evidence and is not unconstitutional); Nelson v. St., 513 S.W.2d 496, 498 (Ark. 1974) (holding that trial court did not err in allowing questions by jurors); People v. Majors, 956 P.2d 1137, 1151 (Cal. 1998) (permitting juror questioning as can be beneficial); Spitzer v. Hains & Co., 587 A.2d 105, 114 (Conn. 1991) (citations omitted) (holding that juror questioning is within the trial court's discretion because it is similar to questioning of witnesses by a trial judge, which is permitted); Yeager v. Greene, 502 A.2d 980, 999 (D.C. App. 1985) (finding juror questioning appropriate when carefully controlled because it aids jurors in fact-finding function); Fla. Stat. § 40.50(3)(4) (2001) (judge must permit jurors to question witnesses); Haw. R. Penal P. 26(b) (2000) (juror questioning allowed in court's discretion, certain procedures must be followed); Idaho R. Civ. P. 47(q) (2001); Idaho Crim. R. 30.1 (2001) (same); Lawson v. St., 664 N.E.2d 773, 780 (Ind. App. 1996) (stating that "Indiana has long recognized that jurors have a right to submit questions . . . and that instructing the jury to the contrary is reversible error."); Rudolph v. Iowa Methodist Med. Ctr., 293 N.W.2d 550, 556 (Iowa 1980) (allowing juror questioning because it aids jurors in the fact-finding process); St. v. Walker, 26 P.3d 645, 649 (Kan. 2001) (holding that the decision to allow juror questioning is within the trial court's discretion); Transit Auth. of River City v. Montgomery, 836 S.W.2d 413, 416 (Ky. 1992) (encouraging juror questioning "with strict supervision by the trial judge, if it is likely to aid the jury in understanding a material issue involved"); Cmty. v. Brito, 744 N.E.2d 1089, 1105 (Mass. 2001) (holding that juror questioning is within discretion of trial court); People v. Heard, 200 N.W.2d 73, 76 (Mich. 1972) (same); St. v. Sickles, 286 S.W. 433, 433-434 (Mo. App. 1926) (permitting juror questioning if managed by the trial court); St. v. Graves, 907 P.2d 963, 967 (Mont. 1995) (holding that trial court may allow juror questioning if certain safeguards are followed); Flores v. St., 965 P.2d 901, 902-03 (Nev. 1998) (condoning juror questioning in the trial court's discretion if procedural safeguards are followed); N.H. Super. Ct. R. 64-
outlawed the practice. Additionally, every circuit that has dealt with the issue has determined that juror questioning is within the trial court’s discretion, although, like the states, the circuits encourage the practice in varying degrees. A recent
survey of 594 federal judges and 392 Texas judges showed nearly sixty percent believe jurors should be able to ask questions during a trial. This accords with a survey of more than 200 jurors who took part in a jury reform pilot project in Los Angeles. Fifty-one percent of the responding jurors said that the fact they were able to submit questions "made a difference," whether they submitted a question or not. A mere five percent stated that the ability to ask questions did not make a difference. As one Arizona juror stated, "We asked some pretty bone-headed questions, but there were some times we just needed a more thorough explanation.... It certainly made me feel more comfortable in my abilities to understand the facts and to make a good decision." 

Even if but a small number of judges and jurors favored juror questioning, the practice would nevertheless be important from time to time to aid jurors in the fact-finding process, as one study has found. After all, if just a single juror is confused about a factual issue of significance, but cannot obtain the information he or she needs by asking a question, then that juror will not make a well-informed decision. Instead, the juror's decision may be based upon speculation and misinformation, and, thus, there is a possibility that the jury's verdict will be based upon speculation and misinformation as well.

Juror questioning can also be useful to attorneys. An attorney may not be aware of instances in which jurors may become confused. Even the most sensitive attorney would have to be clairvoyant in order to detect all potential occasions for misunderstanding. Certainly, some kinds of evidence are inherently complex and are readily identifiable as such. However, what is less easily perceived by attorneys are the moments that jurors simply are not paying attention. Inattentiveness is not a problem inherent in jurors, but a problem inherent in human beings. Research shows that most people can only sustain a high level of concentration for fifteen to twenty minutes. Even when people maintain a high level of attentiveness, it is inevitable that their minds will wander. It is also a commonly known fact that the ability to concentrate diminishes as a person becomes tired or bored, a fact to which jurors who spend hour upon hour in mundane surroundings can certainly attest.

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6. Id. at 191.
7. Id.
8. See Curriden, supra n. 4.
9. See Steven D. Penrod & Larry Heuer, Tweaking Commonsense: Assessing Aids to Jury Decision Making, 3 Psychol. Pub. Policy & Law 259, 271-81 (1997). The authors conducted a study of the effect of juror questioning which indicated jurors who were permitted to question witnesses "felt somewhat better informed by the evidence and were more confident that they had sufficient information for reaching a responsible verdict." Id. at 275.
11. Id. at 20.
If the jurors are misinformed and deliver a poorly reasoned verdict, chances are that the attorneys will never find out about it. In most federal jury trials, the jury simply indicates its decision on a verdict form in which the jury finds for the plaintiff or defendant. The jury does not state the reasons for its decision. In addition, even if an attorney suspects that the jury arrived at its decision through speculation or misinformation, the rules regarding the “sanctity of the jury’s verdict” will likely make such suspicions nearly impossible to prove. Indeed, even if provable, the verdict could probably not be impeached. Therefore, it is critical that jurors be permitted to ask questions on points of confusion or concern before going into the jury room for deliberation.

This comment begins by briefly outlining the history of juror questioning in the English common law and in United States courts. Next is a discussion of the potential dangers of juror questioning brought to life in the case of State v. Zima. Following that is a discussion of the procedures courts currently use when juror questioning is allowed. The next section will address the merits of juror questioning when managed using appropriate procedural safeguards. Next, the constitutionality of juror questioning is analyzed. Finally, the comment is

12. Charles Alan Wright & Arthur R. Miller, Federal Practice & Procedure vol. 9A § 2501, 151 (West 1995). In the general verdict forms used in federal civil trials, the verdict is a simple statement similar to the following: “We the jury in the above-entitled action find for the plaintiff and against the defendant in the amount of $______ dollars.”  Floyd v. Laws, 929 F.2d 1390, 1395 (9th Cir. 1991) (citing 1 Fed. Proc. Forms § 1:1594 (1975)). Interestingly, the lack of specificity inherent in general verdicts is viewed positively by some legal scholars who value its efficiency. In his famously tongue-in-cheek discussion of general and special verdicts, Edson R. Sunderland wrote:

The great technical merit of the general verdict... [is that it] covers up all the shortcomings which frail human nature is unable to eliminate from the trial of a case. In the abysmal abstraction of the general verdict concrete details are swallowed up, and the eye of the law, searching anxiously for the realization of logical perfection, is satisfied... It serves as the great procedural opiate, which draws the curtain upon human errors and soothes us with the assurance that we have attained the unattainable.

Edson R. Sunderland, Verdicts, General & Special, 29 Yale L.J. 253, 262 (1920).

13. A general verdict may, however, be accompanied by a list of interrogatories. See Fed. R. Civ. P. 49(a) (2001). Conversely, special verdicts, which consist of a list of interrogatories calling for findings of fact, may be used instead of a general verdict. See Fed. R. Civ. P. 49(b) (2001).

14. See Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines Ltd., 369 U.S. 355, 364 (1962) (unless the verdict is wrong as a matter of law or is inconsistent, re-determination of facts found by a jury is contrary to the Seventh Amendment right to trial by jury); Mid-West Underground Storage, Inc. v. Porter, 717 F.2d 493, 501 (10th Cir. 1983) (“It is well settled that a verdict will not be upset on the basis of speculation as to the manner in which the jurors arrived at it.”); Hernandez, 176 F.3d at 723 (defendant argued that he had been denied his Sixth Amendment right to a fair trial before an impartial jury in part because jurors were permitted to question witnesses). In rejecting the defendant’s Sixth Amendment argument, the Hernandez court stated:

[T]here is nothing here to suggest ‘jury misconduct’ other than the unsupported inference that the juror who posed the question had reached a decision about the defendant’s guilt before the end of the trial... We will not violate the sanctity of the jury by requiring a judge to probe into the motivation behind a juror’s question.

Id.

15. See Chi., Rock Island & P. R.R. Co. v. Speth, 404 F.2d 291 (8th Cir. 1968) (“It is well settled that a jury’s misunderstanding of testimony, misapprehension of law, errors in computation or improper methods of computation, unsound reasoning or other improper motives cannot be used to impeach a verdict. These matters all inher in the verdict itself.”); compare id. with Atlantic & Gulf Stevedores, 369 U.S. at 364.

16. 468 N.W.2d 377.
concluded with a proposal for reformation of state and federal rules of procedure to permit jurors to question witnesses if appropriate procedural safeguards are followed.

II. HISTORY OF JUROR QUESTIONING

A. The Early History

Although there is a perception that juror questioning is the latest trend, this is far from the truth. In fact, in the English common law, juror questioning dates from at least the eighteenth century. Sir William Blackstone included the jury in his view of the trial as a search for the truth: “The occasional questions of the judge, the jury, and the counsel, propounded to the witnesses on a sudden, will sift out the truth much better than a formal set of interrogatories previously penned and settled.”

In the United States, courts have permitted jurors to question witnesses since the nineteenth century. Perhaps this history is obvious from the near unanimous agreement that the decision of whether to allow juror questioning is within the trial court’s discretion. In one of the earliest cases found by this author disputing the practice, the court seemed perplexed as to why there would be a quarrel over the issue:

Plaintiff’s counsel objects... to the fact that one or two of the jurymen... asked questions of the witnesses in their endeavor to properly understand the facts in evidence. We do not see how this could have possibly been prejudicial to the plaintiff, and do not see why it was not a commendable thing in... the jury, endeavoring to ascertain just exactly the situation at the time of the injury, so that [it] could properly determine the case....

17. E.g. Nancy Ritter, Innovation for Jurors: Let the Questions Rip, 8 N.J. Law. 3 (Dec. 20, 1999); U.S. v. Nivica, 887 F.2d 1110, 1123 (1st Cir. 1989) (“Jurors’ interrogation of witnesses, although perhaps coming into vogue... has only occasionally been permitted in federal courts.”); Morrison, 845 S.W.2d at 884 (“The practice of juror questioning reflects the currently popular movement to downplay long-standing adversarial principles in favor of an intensified focus on truth-finding.”).
21. See supra nn. 1, 3.
23. Id. at 332; see Miller v. Comm., 222 S.W. 96 (Ky. 1920) (“Any member of the jury has the right, during the examination of a witness, to ask any competent, pertinent question.”) (emphasis added); Chi. Hanson Cab Co. v. Havelick, 131 Ill. 179, 180 (1889) (court rejected defendant’s complaint that questions asked by juror showed a bias in favor of the plaintiff). For an excellent discussion of juror questioning, see State v. Kendall, 57 S.E. 340, 341 (N.C. 1907), in which the court stated:

There is no reason that occurs to us why [juror questioning] should not be allowed in the sound legal discretion of the court, and where the question asked is not in violation of the general rules established for eliciting testimony in such cases. This course has always been
B. Courts Begin Reining in the Jurors

Originally, juror questioning was not known as juror questioning; it was known as "juror outbursts,"24 which gives the reader some idea as to the formality of the procedure. If a juror had a question, the juror would simply blurt it out in open court.25 During the 1950s and 1960s, courts began establishing more formal procedures for juror questioning.26 The earliest case in which a court created formal procedures for juror questioning was decided in 1926. That case, State v. Sickles,27 is perhaps the most appalling example of juror questioning gone awry.

In Sickles, the Missouri Court of Appeals created what appears to be the first judicially created procedural safeguard placed on the practice of juror questioning when it held that it was not necessary for an attorney to object to a juror's question in order to preserve the objection for appeal.28 The defendant was charged with violating Missouri's prohibition laws.29 The court gave a juror permission to question the defendant when the defendant took the stand as a witness.30 The juror, however, asked the defendant improper questions regarding the defendant's nationality, the length of time he had lived in the United States, and whether he was a United States citizen.31 Even worse, additional questions the juror asked indicated that the juror regarded the defendant as guilty.32 Assumingly because of the potential awkwardness involved, the defendant's attorney did not object to the questioning.33 However, the Missouri Court of Appeals determined that an objection was not necessary, recognizing that if the defense attorney had objected "and by so doing offend[ed] the juror and he loses his case he has no remedy."34

Besides the Sickles court's sympathetic approach to counsel's lack of objection, the court also placed the responsibility to control juror questioning squarely on the shoulders of the trial judge.35 The court reasoned that when the court allows a juror to question a witness, the juror represents the court, and so

followed without objection so far as the writer has observed, in the conduct of trials in our Superior Courts . . .

Id.
24. Wolff, supra n. 18, at 817-18.
25. Id.
26. See Harris v. Comn., 411 S.W.2d 924, 925 (Ky. 1967) (holding it was reversible error for court to permit prosecutor to answer juror's question out of the hearing of all the jurors); Sparks v. Daniels, 343 S.W.2d 661, 666 (Mo. App. 1961) (counsel's questioning of witness should not have been interrupted so that juror could ask the witness a question, not error for court to invite juror questioning for clarification in its opening remarks); St. v. Martinez, 326 P.2d 102, 103-04 (Utah 1958) (trial court abused its discretion by frequently inviting and encouraging juror to question witnesses).
27. 286 S.W. 432.
28. Id. at 434.
29. Id. at 433.
30. Id.
31. Id.
32. Sickles, 286 S.W. at 433.
33. Id.
34. Id.
35. Id. at 433-34.
the court should ensure that no improper questions are asked.\textsuperscript{36} According to the \textit{Sickles} court, when the juror began asking about the defendant's citizenship, the court should have figured\textsuperscript{1} out that the juror was asking improper questions, stopped the questioning, and should not have permitted the questions to be answered.\textsuperscript{37} The defendant's conviction was reversed.\textsuperscript{38}

\textit{State v. Martinez}\textsuperscript{39} is another early case in which a court placed procedural constraints on the practice of juror questioning. In \textit{Martinez}, the trial court frequently invited and encouraged jurors to question witnesses.\textsuperscript{40} What's more, after the jury began deliberations, the court invited the jury to question a witness who had not even been called to testify.\textsuperscript{41} In all, the jury asked some fifty questions.\textsuperscript{42} In light of these facts, the Utah Supreme Court determined that the trial court had abused its discretion.\textsuperscript{43} Although it stated that the decision to allow juror questioning was within the trial court's discretion,\textsuperscript{44} the \textit{Martinez} court made it pointedly clear that it did not approve of the trial court's solicitation of the questions and stated that juror questioning "should be permitted only as a rarity."\textsuperscript{45}

Some courts today have adopted the view of the \textit{Martinez} court—that juror questioning should be allowed "only as a rarity."\textsuperscript{46} Unfortunately, this position serves to intensify the misguided perception that juror questioning is a problem. If procedural safeguards to prevent prejudice were used in each instance, there would be little reason to fear juror questioning. Moreover, allowing juror questioning only infrequently, but without procedural safeguards, is no remedy for a party that has been prejudiced by the haphazard use of the practice. Given that many courts use an abuse of discretion standard of review when evaluating juror questioning concerns,\textsuperscript{47} this remedy appears even less meaningful. The best approach is to use procedural safeguards in every case. Doing so would balance the jury's duty to uncover the truth and render an appropriate verdict with the parties' need for fairness.

\textsuperscript{36} \textit{Id.} at 433-34.
\textsuperscript{37} \textit{Sickles}, 286 S.W. at 434.
\textsuperscript{38} \textit{Id.}
\textsuperscript{39} 326 P.2d 102.
\textsuperscript{40} \textit{Id.} at 103.
\textsuperscript{41} \textit{Id.}
\textsuperscript{42} \textit{Id.}
\textsuperscript{43} \textit{Id.}
\textsuperscript{44} \textit{Martinez}, 326 P.2d at 103.
\textsuperscript{45} \textit{Id.}
\textsuperscript{46} \textit{E.g.} \textit{Collins}, 226 F.3d at 463.
\textsuperscript{47} \textit{E.g.} \textit{Richardson}, 233 F.3d at 1288; \textit{Collins}, 226 F.3d at 461; \textit{Hernandez}, 176 F.3d at 725; \textit{Sheridan v. St.}, 852 S.W.2d 772, 784 (Ark. 1993); \textit{Spitzer}, 587 A.2d at 107.
III. A DEMONSTRATED NEED FOR PROCEDURAL SAFEGUARDS

A. Trial Court Generally Decides When and How Juror Questioning Is Used

The vast majority of state and federal courts that have considered the issue of whether to allow juror questioning have determined that the question lies within the trial court’s discretion. Most jurisdictions do not have rules or statutes prohibiting juror questioning or mandating its permission, so trial courts generally have authority to allow juror questioning as they see fit and in the manner they see fit. This is in keeping with the general principle that, “in general, all matters which relate to the orderly conduct of a trial... which are not regulated by precise statute or rule... are within the discretion of the court.”

Of course, speaking broadly, judges are highly capable individuals for whom managing juror questioning is not usually problematic. This is evident from the fact that juror questioning has produced so few errors during the long period in which it has been in use. However, absent measures to safeguard parties’ rights and avoid unnecessary delay, juror questioning has the potential to be dangerous or become unruly. One court has said of juror questioning, “In most cases, the game will not be worth the candle,” but if appropriate procedural safeguards were in place in each instance, there would be no “candle” about which to be concerned in the first place.

B. State v. Zima: The Nebraska Supreme Court Overreacts

State v. Zima is a superb demonstration of how juror questioning can be fertile ground for error when unhindered by rules that safeguard the parties and

48. See supra nn. 1, 3.
49. See supra nn. 1, 3; but see Fla. Stat. § 40.50(3)-(4):

The court shall permit jurors to submit to the court written questions directed to witnesses or to the court. The court shall give counsel an opportunity to object to such questions outside the presence of the jury. The court may, as appropriate, limit the submission of questions to witnesses.

The court shall instruct the jury that any questions directed to witnesses or the court must be in writing, unsigned, and given to the bailiff. If the court determines that the juror’s question calls for admissible evidence, the question may be asked by court or counsel in the court’s discretion. Such question may be answered by stipulation or other appropriate means, including, but not limited to, additional testimony upon such terms and limitations as the court prescribes. If the court determines that the juror’s question calls for inadmissible evidence, the question shall not be read or answered. If the court rejects a juror’s question, the court should tell the jury that trial rules do not permit some questions and that the jurors should not attach any significance to the failure of having their question asked.

50. 88 C.J.S. Trial § 91 (2000).
51. Cf. Mary Gallagher, Questioning by Jurors Is a Hit with Judges, Not So with Lawyers, 161 N.J. L.J. 304 (July 24, 2000). Interviewed judges who participated in a juror questioning pilot project in New Jersey had positive impressions of juror questioning.
52. This author has discovered only four cases in which juror questioning has produced reversible error: Sickles, 266 S.W. 432; Zima, 468 N.W.2d 377; Martinez, 326 P.2d 102; Ajmal, 67 F.3d 12.
53. See Sickles, 266 S.W. at 433-34.
54. See Zima, 468 N.W.2d at 379-80.
55. Sutton, 970 F.2d at 1005.
the process. Zima was charged with driving while intoxicated and with a traffic offense. During the trial, after the parties questioned the witnesses, the trial judge invited the jury to ask questions. The judge allowed the jury to question the witnesses orally, rather than by submitting questions in writing to the judge. Submission of written questions is the practice preferred by many courts, and is arguably wiser than allowing oral questions because the judge is afforded more control over the process.

During one juror's questioning of a witness regarding breath-testing devices, the juror made statements akin to testimony:

Juror: "To your knowledge, has there ever been a time when [the breath testing device] hasn't worked?"

Witness: "Not to my knowledge."

Juror: "To mine there was."

Court: "Now wait a minute."

In an apparent attempt to take control of the situation, the court intervened, but the juror and witness continued their dialogue, seemingly oblivious to the judge. The defendant was ultimately convicted.

When Zima was decided, juror questioning was an issue of first impression in Nebraska. The majority acknowledged that safeguarding techniques in place in other jurisdictions, such as requirements that juror questions be in writing and be reviewed by the court and by counsel, curtail the possibility of improper questioning by jurors. However, the Zima court nevertheless prohibited juror questioning, stating that the practice could affect a defendant's right to a fair trial before an impartial jury. The court's concerns about fairness were rooted in a fear that the practice would make jurors "become advocates and possible antagonists of the witnesses." However, the court failed to offer any evidence, psychological or otherwise, that asking questions, even for mere purposes of clarification, would lead jurors to advocate one party in favor of the other or, in the words of the Zima court, to have an "investment in the answers to questions they have posed."

56. Zima, 468 N.W.2d at 378.
57. Id.
58. See id.
59. See generally Britto, 744 N.E.2d at 1105; Williams, 484 S.E.2d at 155; Graves, 907 P.2d at 967.
60. Zima, 468 N.W.2d at 378-79.
61. Id. at 379.
62. Id. at 378.
63. Id. at 379.
64. See id.
65. Zima, 468 N.W.2d at 379.
66. Id. at 379-80.
67. Id. at 380.
68. Id.
In a scathing concurrence, Nebraskan Supreme Court Justice Shanahan argued that juror questioning should be permitted to aid jurors in their search for the truth and to bring about reliable decisions:

"[I]f the objective of a trial, particularly a jury's fact-finding role in the judicial process, is ascertaining truth, or at least probable truth, for resolution of disputed claims or contradictory contentions and positions of litigants, an absolutely prohibitive rule against all questions from jurors is as incomprehensible as it is imprudent."

Additionally, Justice Shanahan found the majority's total prohibition of juror questioning unwarranted in light of procedural safeguards used successfully in many other jurisdictions. "Although good sometimes comes from marching to the beat of a different drummer," Justice Shanahan said, "the majority's drumbeat is drowned out by the band of courts in other jurisdictions...."

It is certainly telling that out of all of the cases in which courts have permitted jurors to ask questions, only four cases come to light that have resulted in reversible error. Two of those cases are Sickles and Martinez. Admittedly, however, at least one court has observed that "[a] determination of harm [in the context of juror questioning] is virtually impossible." Nevertheless, given the wide availability of the procedure in state and federal courts and the scant problems accompanying its use, the notion that juror questioning is undermining the adversarial nature of American jurisprudence and constitutional guarantees of due process is quite far-fetched.

IV. DON'T THROW THE BABY OUT WITH THE BATHWATER

A. Prophylactic Procedures to Prevent Potential Prejudice

As is evident from Zima, Sickles, and Martinez, if juror questioning were allowed to operate unchecked without procedures in place to prevent prejudice, then harmful effects could very well result. Certainly, jurors should not be permitted to blurt out questions in open court or interrupt the examination of witnesses by counsel, as in Zima. Nor should jurors be allowed to give

69. The majority affirmed the defendant's conviction because at trial he had argued against a mistrial. Id. Justice Shanahan concurred in that result. Id. at 380 (Shanahan, J., concurring).
70. Zima, 468 N.W.2d at 380 (Shanahan, J., concurring).
71. Id. at 381.
72. Id.
73. Id.
74. See Sickles, 286 S.W. at 434; Martinez, 326 P.2d at 103; St. v. Jeffries, 644 S.W.2d 432, 435 (Tenn. Crim. App. 1982) (appellate court deemed the juror questioning too extensive where it covered 42 pages of the trial transcript and the questions were mainly asked of witnesses who testified regarding the defendant's alibi); Ajmal, 67 F.3d at 14-15 (citing Bush, 47 F.3d at 515-16 (vacating and remanding for new trial because juror questioning permitted by trial court was "extensive," and because there were no "extraordinary or compelling circumstances" to warrant juror questioning)).
75. Morrison, 845 S.W.2d at 889.
76. 468 N.W.2d at 379.
testimony, ask whatever they want, or ignore the trial judge, as in Sickles.77 With proper procedures in place—procedures courts have developed to handle the issues of prejudice that so alarmed the Zima court and others—juror questioning can be a useful, highly beneficial tool to help jurors reach better decisions in their search for the truth.

There are a number of simple, common sense procedures that are recommended if a judge decides to allow the jury to question witnesses. First, it has been suggested that the trial judge notify counsel as soon as possible if jurors will be allowed to question witnesses.78 Also, counsel should be given a chance to object to the questions posed by jurors.79 The judge should examine questions submitted by jurors with the attorneys and rule on any objections out of the jury’s hearing.80

Jurors themselves should be expected to follow appropriate procedures. For instance, the court should instruct the jury to ask questions only on important points,81 and that jurors should attach no significance to the fact that a question posed by a juror is not asked.82 Jurors should not discuss the substance of their questions with each other.83 Additionally, jurors’ questions should not be asked orally, but should be submitted to the judge in writing.84

Some jurisdictions have codified juror questioning procedures,85 and in many of those jurisdictions the above procedures are mandatory. However, in most jurisdictions, the trial court has discretion to decide whether and how to conduct juror questioning.86 Thus, the suggested juror questioning procedures offered by appellate courts are usually just that—suggested. However, if courts used the above-described procedures across the board, opportunities for prejudicial incidents resulting from juror questioning would be greatly diminished.

77. 286 S.W. at 433.
78. See Sutton, 970 F.2d at 1005.
79. E.g. id. at 1005-06; Bush, 47 F.3d at 516; Rudolph, 293 N.W.2d at 556.
81. E.g. Richardson, 333 F.3d at 1291; Collins, 226 F.3d at 463; but see Britto, 744 N.E.2d at 1105 (“Jurors’ questions need not be limited to ‘important matters’ . . . but may also seek clarification of a witness’s testimony.”) (citations omitted).
82. E.g. Sutton, 970 F.2d at 1005; Spitzer, 587 A.2d at 109.
84. E.g. Sutton, 970 F.2d at 1005; Munoz, 837 P.2d at 659.
85. See Ariz. R. Civ. P. 39(b)(10); Fla. Stat. § 40.50(3)-(4); Haw. R. Penal P. 26(b); Idaho R. Civ. P. 47(q); Idaho Crim. R. 30.1; Ind. R. Evid. 614(d); N.H. Super. Ct. R. 64-B; N.D.R. Cr. 6.8; Wyo. R. Civ. Proc. R. 39.4. Neither the Federal Rules of Civil Procedure nor the Federal Rules of Evidence explicitly allow or forbid juror questioning. The only guidance the Rules of Evidence provides is Rule 611(a) which directs the court to “exercise reasonable control over the mode and order of interrogating witnesses . . . .” Fed. R. Evid. 611(a) (2001). Some courts have construed the fact that judges may question witnesses as permitting juror questioning. E.g. U.S. v. Witt, 215 F.2d 580, 584 (2d Cir. 1954); but see DeBenedetto, 754 F.2d at 516.
86. See supra nn. 1, 3.
B. The Benefits of Controlled Juror Questioning

The foremost benefit of juror questioning is quite simple: it can help jurors understand the evidence and issues in a trial, especially in a complex case.\(^{87}\) Importantly, a juror’s question may reveal confusion on a critical issue in the trial.\(^{88}\) According to Massachusetts Attorney General Thomas F. Reilly, “If [the jurors are] operating on misinformation . . . it gives you an opportunity to correct that.”\(^{89}\) There is no such opportunity without juror questioning. In courts that prohibit jurors from asking questions, a juror cannot ask a question even if that juror knows that he or she is confused about an issue and needs information to render an appropriate verdict. This effectively forces the factfinder to operate without the facts.\(^{90}\) The juror must either guess at the facts, or rely on the opinions of other jurors during deliberations. Certainly, this is not desirable.

Besides the value of juror questioning to the jury in rendering a proper verdict, attorneys may also find the practice useful, as a juror’s question may signal them to delve deeper than they had originally planned into certain issues.\(^{91}\) Additionally, judges have found that that juror questioning can make jurors more attentive.\(^{92}\) This, of course, is also worthwhile in view of jurors’ ever-present struggle to concentrate for long periods of time.\(^{93}\)

C. The Dangers of Juror Questioning Are Easily Remedied by the Use of Procedural Safeguards

Those who oppose allowing jurors to ask questions under any circumstances put forth several arguments, many of which are remedied by the use of safeguarding procedures. For instance, it is argued that objecting to a question asked by a juror is awkward for a lawyer.\(^{94}\) Additionally, it is asserted that jurors might be offended if their questions are not asked.\(^{95}\)

Admittedly, if attorneys were compelled to make their objections to jurors’ questions in front of the jurors, the attorney would be in quite a quandary. However, concerns about potential awkwardness or offense are remedied without difficulty. If questions are submitted to the court in writing, and if the court and counsel examine the questions outside the hearing of the jury,\(^{96}\) counsel does not object to questions in the jury’s presence, so any potential awkwardness is

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88. Id.
90. See Heard, 200 N.W.2d at 76 (stating that “[t]he basic reason underlying [a juror’s asking questions of a witness] is that the jurors are the finders of fact and any questions they may ask may help them in reaching their ultimate determination.”).
91. Gittleman, supra n. 87; Ritter, supra n. 17; Curriden, supra n. 4.
92. Gittleman, supra n. 87; Gallagher, supra n. 51.
93. See Mauet, supra n. 10, at 19-20.
94. Gittleman, supra n. 87.
95. Id.
96. See e.g. Brito, 744 N.E.2d at 1105.
avoided. The jury cannot listen to the attorneys' arguments and jurors do not learn the reasons their questions were not asked. Thus, the chance that a juror will take offense is greatly reduced. It is also good practice to instruct the jurors that they should not be offended if a question they offer is not asked.97

Those who oppose juror questioning also argue that juror questioning will undermine the parties' trial strategies and force the parties to delve into issues that they would rather avoid.98 Some attorneys are grateful for this problem because it informs them of the issues about which the jury is interested in hearing.99 This concern is partially resolved by allowing the parties to examine the questions outside the jury's presence and make objections, which is a practice often suggested.100

It is argued that juror questioning harms juror neutrality—that in asking a question, jurors may take a position in favor of one party or the other before all the evidence has been admitted.101 This is perhaps the strongest argument for those who oppose juror questioning, as it has been used to abolish juror questioning in two jurisdictions.102 Proof in support of this proposition, however, is nowhere to be found.103

There has been no chain of logic, no syllogism, no psychological data, not even a personal testimonial that when a juror asks a question it entails (or even makes it more probable than not) that he or she has adopted a position and is no longer neutral. Rather, those who oppose juror questioning on the grounds that it will adversely affect juror neutrality simply cite to authorities that have themselves

97. See e.g. id.
98. Gittleman, supra n. 87.
99. Id.; Ritter, supra n. 17; Curriden, supra n. 4.
100. See e.g. Britto, 744 N.E.2d at 1105.
101. Gittleman, supra n. 87; Buchanan v. St., 807 S.W.2d 644, 647 (Tex. App. 14th Dist. 1991) (Ellis, J., dissenting); but see U.S. v. Land, 877 F.2d 17, 19 (8th Cir. 1989) (rejecting defendant's argument that juror questions gave the appearance that jurors were improperly evaluating the evidence on the grounds that "speculation as to the mindset of the jurors who asked and heard questions is just that—speculation").
102. See Zima, 468 N.W.2d at 380; Morrison, 845 S.W.2d at 886 ("The practice of juror questioning of witnesses is most disturbing in its potential for undermining ... the adversary process."). In Jumpp, 619 A.2d at 613, the New Jersey Supreme Court Appellate Division directed that trial courts should not allow juror questioning until the New Jersey Supreme Court decides whether to allow the practice. The Jumpp court found "considerable" dangers in the practice, including an adverse effect upon the jurors' objectivity. Id. at 613.
103. See U.S. v. Johnson, 892 F.2d 707, 713 n.3 (8th Cir. 1989) (Lay, C.J., concurring) ("Although no empirical studies address the effect of juror questions on neutrality, several commentators mention it."). Chief Judge Lay attributes the lack of evidence to the difficulty of testing: "juror questioning ... [is] a practice fraught with potential unfairness of a subtle and psychological nature that is difficult to identify with particularity." Id. at 711.
provided no evidence for the proposition,\textsuperscript{104} or authorities that are not relevant at all.\textsuperscript{105}

Although it has \textit{not} been demonstrated that juror questioning creates biases, it has been demonstrated that allowing the practice may prevent impartially rendered verdicts because biased jurors can be exposed through their questions.\textsuperscript{106} \textit{Sickles} and \textit{Zima} are the prime examples of this.\textsuperscript{107} Indeed, it is difficult to conceive of how the biased jurors’ impartiality would be discovered if they had sat silently throughout the trial. Rather, the jurors’ biases were revealed through their questions and through nothing else.

Some commentators argue that \textit{Zima} is not an example of juror impartiality exposed, but is an example of juror questioning \textit{created}. In other words, these commentators argue that it was the \textit{asking of the questions themselves} that made that juror biased against the defendant\textsuperscript{108} and, hence, that the asking questions presents a danger of bias for all jurors.\textsuperscript{109} In other words, in \textit{Zima}, it was not the fact that the juror was using his own personal experience to prematurely evaluate the evidence, or the fact that the \textit{Sickles} juror was a bigoted xenophobe—no, the fact that they \textit{asked questions} created biases in these jurors. Common sense says otherwise. So does at least one empirical study.\textsuperscript{110}

In one study in which the effects of juror questioning were examined, jurors were permitted to ask questions during seventy-one trials, and at least one question was asked in fifty-one of those trials.\textsuperscript{111} The researchers found that juror

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\textsuperscript{104} See Laurie Forbes Neff, Student Author, \textit{The Propriety of Jury Questioning: A Remedy for Perceived Harmless Error}, 28 Pepp. L. Rev. 437 (2001). Neff cites several cases that express a fear that juror questioning will diminish juror neutrality: \textit{Bush}, 47 F.3d at 515; \textit{U.S. v. Douglas}, U.S. v. \textit{Douglas}, 81 F.3d 324, 326 (2d Cir. 1996); \textit{U.S. v. Feinstein}, 89 F.3d 333, 336 (7th Cir. 1996); \textit{Groene}, 998 F.2d at 606; \textit{U.S. v. Brockman}, 183 F.3d 891, 899 (8th Cir. 1999); \textit{Jeffries}, 644 S.W.2d at 435; \textit{Williams}, 484 S.E.2d at 155. None of these cases offers support for the basis of this fear. Each of these cases merely cites to earlier cases that themselves do not give support for the basis of this fear.

\textsuperscript{105} See Kara Lundy, Student Author, \textit{Jurat Questioning of Witnesses: Questioning the United States Criminal Justice System}, 85 Minn. L. Rev. 2007, 2030 (2001). The author states, “Jurat questioning prevents jurors from being impartial because impartiality depends upon passivity.” As support for this statement, Lundy cites to Lon L. Fuller, \textit{The Forms and Limits of Adjudication}, 92 Harv. L. Rev. 353, 382-83 (1978), for the proposition that an arbiter takes on the roles of judge and of advocate for both litigants if the arbiter determines the outcome of the dispute without assistance from rival advocates. Of course, this analogy does not apply, as there are rival advocates (i.e., the parties’ attorneys) involved in a trial setting. Thus, Lundy’s contention lacks relevant support.

\textsuperscript{106} See \textit{Sickles}, 286 S.W. at 433-34.

\textsuperscript{107} See id; \textit{Zima}, 468 N.W.2d at 379-80.

\textsuperscript{108} Lundy, supra n. 105, at 2030. Lundy writes:

\begin{quote}
As an active investigator, a juror must form a hypothesis in order to formulate questions for a witness, because the questions test her hypothesis. Any hypothesis formulated by a juror, however, ends the juror’s impartiality. In \textit{State v. Zima}, one juror clearly pursued his hypothesis that the arresting officer’s breath simulator malfunctioned during the defendant’s test when [the juror] questioned the arresting officer. By questioning the witness in this manner, this juror failed to postpone the formation of an opinion until after the parties presented all of their evidence . . . . In short, the juror was no longer impartial when he began to question the witness.
\end{quote}

\textit{Id.}\textsuperscript{109}

\textsuperscript{109} Id.

\textsuperscript{110} Penrod & Heuer, supra n. 9.

\textsuperscript{111} Id. at 274.
questioning did not have any noteworthy effect on the verdicts rendered.\textsuperscript{112} Additionally, judges were asked what their preferred verdict would have been so that the researchers could compare the agreement rate between the judges’ preferred verdicts and the juries’ verdicts.\textsuperscript{113} There was no significant difference there either.\textsuperscript{114} In fact, the agreement rate between the judges’ verdicts and the juries’ verdicts was slightly higher in trials where juror questioning was allowed.\textsuperscript{115} In any event, if only to allay unfounded fears, no harm is done by instructing jurors that they should not become advocates for any party, but should remain impartial.\textsuperscript{116}

Opponents of juror questioning also contend that the practice is too time-consuming.\textsuperscript{117} However, the above empirical study indicates just the opposite.\textsuperscript{118} Although one never likes to question such things, whether one accepts the notion that juror questioning is too time-consuming appears to depend upon whether one approves of juror questioning in general and, moreover, whether one is a lawyer or a judge.\textsuperscript{119} For instance, most judges who participated in a six-month-long New Jersey pilot project in which jurors were permitted to ask questions of witnesses viewed the practice favorably.\textsuperscript{120} Concededly, one judge said that the time required for juror questioning was a disadvantage;\textsuperscript{121} however, even that judge characterized the time required as “minimal.”\textsuperscript{122} Two judges agreed that the amount of time typically added to a trial was approximately thirty to sixty minutes.\textsuperscript{123} Some attorneys said the jurors’ questions consumed too much time.\textsuperscript{124} Without a doubt, this is an ironic—and dubious—role reversal.

V. CONSTITUTIONALITY OF JUROR QUESTIONING

Opponents of juror questioning raise sundry constitutional challenges to the practice. They allege that juror questioning infringes upon the Fifth Amendment

\textsuperscript{112} Id. at 278.
\textsuperscript{113} Id.
\textsuperscript{114} Id.
\textsuperscript{115} Id. The agreement rate was seventy-four percent agreement where questioning was allowed; sixty-four percent agreement where it was not. Id.
\textsuperscript{116} See e.g. Britto, 744 N.E.2d at 1105.
\textsuperscript{117} Gallagher, supra n. 51.
\textsuperscript{118} In the study, juror questioning was allowed in seventy-one trials, but jurors only exercised their opportunity to asked questions in fifty-one of the trials. On the average, jurors asked 5.1 questions in each civil trial (median of 1.8 questions) and 4.4 questions in each criminal trial (median of 1.3). There was one juror question asked for every two hours of trial time in both civil and criminal trials (median of .25 questions per hour of trial time). These calculations do not include the questions submitted by the jurors that were not asked. Penrod & Heuer, supra n. 9. However, the fact that those questions (if any) were not included in the calculation probably only has a negligible effect at best, as the researchers reported that the lawyers and judges involved in the study did not find that jurors asked inappropriate questions. Id. at 276.
\textsuperscript{119} See Gallagher, supra n. 51.
\textsuperscript{120} Id.
\textsuperscript{121} Id.
\textsuperscript{122} Id.
\textsuperscript{123} Id.
\textsuperscript{124} See Gallagher, supra n. 51.
right against compelled self-incrimination, and the due process guarantees of the Fifth and Fourteenth Amendments. As will be demonstrated below, however, there are enormous holes in each of these arguments.

A. Juror Questioning Does Not Violate the Right against Compelled Self-Incrimination

Some commentators put forward the idea that juror questioning contravenes a criminal defendant’s Fifth Amendment right against compelled self-incrimination. As the theory goes, if the defendant does not testify and a juror asks a question only the defendant can answer, the defendant is faced with the choice of either testifying or leaving the question unanswered. If the defendant does not testify and thereby leaves the question unanswered, juror questioning opponents argue “the court would have to explain the privilege against self-incrimination to the jury, which would be tantamount to a comment on the defendant’s failure to testify.” At the end of this argument’s intricate maze of “what-ifs” and “let’s suppose,” allegedly lies a constitutional violation.

The above argument, although artfully crafted, has a major flaw that becomes obvious once one remembers that it is not all self-incrimination that is prohibited by the Fifth Amendment, but only government compelled self-incrimination. The Supreme Court has held that “a necessary element of compulsory self-incrimination is some kind of compulsion.” Such compulsion was present in Griffin v. California, in which the trial court had permitted the prosecutor to comment on the defendant’s failure to testify. Such compulsion was also present in Brooks v. Tennessee, where, had the defendant chosen to testify, he would have been required to take the stand before any other defense witness. This, the Court held, effectively compelled the defendant to decide whether to testify before he could ascertain whether his testimony was necessary to his case, and created a violation of the defendant’s Fifth Amendment rights.

Admittedly, in the Brooks decision, the Supreme Court found that it is possible to so strain the defendant’s choices in making his or her defense that the Self-Incrimination Clause is violated. However, the Court has not extended this beyond Brooks’ reach. The Fifth Amendment Self-Incrimination Clause prohibits

125. E.g. Lundy, supra n. 105, at 2033; Zima, 468 N.W.2d at 379-80.
126. Lundy, supra n. 105, at 2033.
127. Id. at 2030.
128. Id. at 2033.
129. E.g. id.
130. E.g. Fisher v. U.S., 425 U.S. 391, 397 (1976) ("The Court has held repeatedly that the Fifth Amendment is limited to prohibiting the use of 'physical or moral compulsion' exerted on the person exerting the privilege.").
133. Id.
135. Id.
136. Id. at 612-13.
compelled self-incrimination; it does not apply to "a defendant’s own subjective perception of what constitutes a proper trial strategy." Moreover, the Supreme Court has held that the Constitution "does not forbid ... every government-imposed choice that has the effect of discouraging the exercise of Constitutional rights." So, the question about juror questioning becomes whether the practice unfairly strains the defense's options in making a defense.

If the defendant is the only person who can answer a juror's question, that might have some bearing on whether the defendant decides, as part of his or her overall trial strategy, to exercise his or her constitutional right not to testify. However, several factors might have some bearing on this decision, and a juror's question would be but one of these. Although to a certain extent this is a judgment call, it appears to this author that the vaguely perceived possibility that a jury might take exception to the fact that a defendant has not testified in order to answer a juror's question is likely insufficient to constitute a violation of the Fifth Amendment's guarantee against self-incrimination.

It is also important to note that the argument that permitting jurors to question witnesses violates the Fifth Amendment is based on pure speculation. There is not any indication that the jury would associate the fact that the defendant did not testify with the fact that a juror's question was not answered. This would not even have the possibility of becoming an issue in the first place unless members of the jury were aware that another juror had submitted a question. As noted above, many courts have enacted procedural safeguards that prevent the jury from learning when a juror has submitted a question. In addition, the notion that the court would be required to explain the privilege against compelled self-incrimination is simply incorrect, unless the defendant requested such an instruction.

137. U.S. v. Perkins, 937 F.2d 1297, 1404 (9th Cir. 1991) (finding no Fifth Amendment violation where the district court gave the government the option to call defendant's parole officer to testify; defendant alleged that he would "have to" testify to "preemptively raise the fact that he was on parole").


140. E.g. Sutton, 970 F.2d at 1005 (requiring that jurors' questions be submitted in writing to the judge); Dominguez, 226 F.3d at 1246 (trial court instructed jurors not to discuss their questions with each other).

141. See Bruno v. U.S., 308 U.S. 287, 294 (1939) (finding reversible error when trial court did not instruct jury regarding defendant's right not to testify when court did not so instruct upon defendant's request but not finding that the instruction was constitutionally required); but see Griffin, 380 U.S. 609 at 615 n. 6 ("We reserve decision on whether an accused can [constitutionally] require ... that the jury[] be instructed that his silence must be disregarded."). However, in some states, courts may be required by their state constitutions, upon the defendant's request, to give an instruction that the jury is not to draw an adverse inference of guilt if the defendant does not testify. See St. v. Patton, 303 P.2d 513, 515 (Or. 1956) ("Such an instruction is proper and should always be given when requested.").

142. Carter v. Ky., 450 U.S. 288 (1981). The court may also give a "no-adverse-inference" instruction regarding the defendant's failure to testify in spite of the defendant's objection to the instruction. Lakeside, 435 U.S. at 340-41. Some federal courts have found reversible error in a trial court's failure to grant a defendant's request for a no-adverse-inference instruction regarding the absence of a witness's testimony (not necessarily the defendant). See Bowles v. U.S., 439 F.2d 536 (D.C. Cir. 1970);
It is not logical to compare a “no-adverse-inference” instruction (a jury instruction directing that an adverse inference not be drawn from the fact that the defendant did not testify) with a disapproving comment on the defendant’s failure to testify. Indeed, the United States Supreme Court has explicitly acknowledged the unsoundness of this argument in *Lakeside v. Oregon*. In *Lakeside*, the Court, quoting Judge Learned Hand in *Becher v. United States*, stated that the purpose of a no-adverse-inference instruction “is to remove from the jury’s deliberations any influence of unspoken adverse inferences. It would be strange indeed to conclude that this cautionary instruction violates the very constitutional provision it is intended to protect.”

Obviously, even if the court did not give a no-adverse-inference instruction, the jury could nonetheless observe on its own that a defendant has not testified. The jury does not need an instruction from the court to draw attention to this fact. Indeed, as much has been openly recognized by the Supreme Court. Some courts have even found reversible error in a trial court’s failure to give a no-adverse-inference instruction regarding the defendant’s choice not to testify. Finally, the entire argument presupposes that jurors will ignore the jury instructions, and thereby ignore their responsibilities under the law. This is hardly a suitable basis upon which to make a constitutional argument.

Opponents of juror questioning also make the inverse of the above argument. They contend that if the court did not explain the privilege not to testify, the jury may speculate as to why its question was not answered and begrudge the fact that the defendant did not testify. If one took this hapless hypothesis to its logical conclusion, one would unearth a Fifth Amendment

but see *U.S. v. Martin*, 526 F.2d 485, 487 (10th Cir. 1975) (holding that it was within trial court’s discretion to refuse to allow an informant, who intended to invoke his Fifth Amendment right against self-incrimination, to be called to testify and be effectively forced to invoke the Fifth Amendment in front of the jury; it was also within the court’s discretion to give the jury a no-adverse-inference instruction regarding the absence of the witness’s testimony).


144. Id. at 341 n. 12 (quoting *Becher v. U.S.*, 5 F.2d 45, 49 (2d Cir. 1924) (internal quotation marks omitted)).

145. Id. (quoting *Becher*, 5 F.2d at 49) (internal quotation marks omitted).

146. See *Carter*, 450 U.S. at 304.

147. See *U.S. v. Bain*, 596 F.2d 120, 122 (5th Cir. 1979) (holding that trial court’s failure to give a no-adverse-inference instruction was reversible error).

148. See *Lakeside*, 435 U.S. at 340. In *Lakeside*, the Supreme Court dealt with this very issue. The Court stated:

The petitioner’s argument would require indulgence in two very doubtful assumptions: First, that the jurors have not noticed that the defendant did not testify and will not, therefore, draw adverse inferences on their own; second, that the jurors will totally disregard the instruction, and affirmatively give weight to what they have been told not to consider at all. Federal constitutional law cannot rest on speculative assumptions so dubious as these.

Id.

149. Lundy, supra n. 105.
infringement in every criminal trial in which criminal defendants exercised the right not to testify and in which a no-adverse-inference instruction was not given. Realistically, it is inevitably true that jurors may speculate about why questions they have were not answered at trial, but this is the case whether or not they are allowed to ask those questions.  

This argument also fails to acknowledge what the Supreme Court has deemed so important: the tool courts consider the most effective to prevent prejudice resulting from the absence of a defendant's testimony at trial is an instruction to the jury that it should not draw an adverse inference therefrom. In Carter, the Supreme Court explained:

Jurors are not experts in legal principles; to function effectively, and justly, they must be accurately instructed in the law. Such instructions are perhaps nowhere more important than in the context of the Fifth Amendment privilege against compulsory self-incrimination, since "[t]oo many, even those who should be better advised, view this privilege as a shelter for wrongdoers. They too readily assume that those who invoke it are . . . guilty of crime . . . ."

Indeed, generally speaking, jury instructions are one of the most effective tools courts have to guide jurors in reaching a verdict.

A defendant's decision to testify resulting from his or her belief that the jury is in search of answers to questions that only he or she can answer is not compelled testimony under the Fifth Amendment. Nor is the Fifth Amendment implicated if a no-adverse-inference instruction is given to the jury, or if it is not given to the jury. It appears that the only proper way to soothe concerns regarding negative juror interpretation of the defendant's choice not to testify would be a jury instruction that the jury should not draw any inferences from the fact that a question submitted by a juror was not asked. Of course, as noted earlier, this remedy is already in place in several jurisdictions, and usually only exercised in the court's discretion.

150. See supra n. 148.

151. See Carter, 450 U.S. at 302. In Carter, the Supreme Court held that a no-adverse-inference instruction must be given to the jury at the defendant's request: "We have repeatedly recognized that 'instructing a jury in the basic constitutional principles that govern the administration of criminal justice' . . . is often necessary." Id. (quoting Lakeside, 435 U.S. at 340 ("The very purpose of a jury charge is to flag the jurors' attention to concepts that must not be misunderstood, such as reasonable doubt and burden of proof. To instruct them in the meaning of the privilege against compulsory self-incrimination is not different.").")

152. Id. at 302 (quoting Ullman v. U.S., 350 U.S. 422, 426 (1956)).

153. See id. at 302 n. 20 (quoting Starr v. U.S., 153 U.S. 614, 626 (1894) ("It is obvious that where any system of jury trials the influence of the trial judge on the jury is necessarily and properly of great weight, and that his lightest word or intimation is received with deference, and may prove controlling.")); Martin, 526 F.2d at 487 (finding that the no-adverse-inference instruction to the jury regarding the absence of a witness's testimony was "proper and served to put the entire matter in context" for the jury).

154. E.g. Sutton, 970 F.2d at 1005.

155. E.g. id.
B. Juror Questioning Does Not Violate Due Process

Those who oppose juror questioning also assert that the practice violates the right to due process,\(^\text{156}\) which is guaranteed by the Fifth\(^\text{157}\) and Fourteenth\(^\text{158}\) Amendments. The reason that juror questioning violates due process is purportedly because the jury becomes impartial if it is permitted to ask questions.\(^\text{159}\) In Zima, for example, the court stated:

Since due process requires a fair trial before a fair and impartial jury, [citation omitted] the judicial process is better served by the time-honored practice of counsel eliciting evidence which is heard, evaluated, and acted upon by jurors who have no investment in obtaining answers to questions they have posed [citations omitted]. Our system is an adversary one which depends upon counsel to put before lay fact finders that which should be admitted in accordance with the rules of evidence and to keep from them that which should not be received in evidence. A change in this system whereby jurors become advocates and possible antagonists of the witnesses does not on its face suggest a fairer or more reliable truth-seeking procedure.\(^\text{160}\)

The lack of evidence for the idea that juror questioning transforms neutral, fair-minded jurors into antagonistic advocates sorely undermines the Zima court's theories.\(^\text{161}\) At least one juror questioning critic has acknowledged the lack of supporting proof, stating, "Although no empirical studies address the effect of juror questions on neutrality, several commentators mention it."\(^\text{162}\)

Although it is not wholly without importance that this concern has been mentioned, what is more significant is what courts have actually done in response to the concerns about the effects of juror questioning upon juror neutrality. The vast majority of courts that have considered the issue have determined that using the prophylactic procedures discussed above will reduce risks associated with juror questioning.\(^\text{163}\) Nevertheless, commentators continue to make vague assertions regarding purely speculative due process violations. However, so long as each juror is willing and able to decide the case solely on the evidence, there is no juror bias.\(^\text{164}\)

It is perhaps not surprising that juror questioning opponents find a haven in the murky waters of the due process analysis for, as has been acknowledged by the

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\(^{156}\) E.g. Zima, 468 N.W.2d at 379-80; but see George, 986 F.2d at 1178 (rejecting defendant's due process argument that juror questioning transforms the jury from neutral observer to adversary).

\(^{157}\) "No person . . . shall be compelled in any criminal case to be deprived of life, liberty, or property, without due process of law . . . ." U.S. Const. amend. V.

\(^{158}\) "... [N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . ." U.S. Const. amend XIV.

\(^{159}\) Because the due process argument and the Sixth Amendment impartial jury argument are objectionable for the same reasons (lack of evidence to support the proposition that juror questioning affects juror partiality), I will discuss the due process argument, as there is more relevant authority on that issue.

\(^{160}\) Id. at 379-80.

\(^{161}\) See supra nn. 103-05.

\(^{162}\) Johnson, 892 F.2d at 713 n. 4 (Lay, C.J., concurring); contra Penrod & Heuer, supra n. 9, at 278 (finding that juror questioning does not impact juror neutrality).

\(^{163}\) See text accompanying supra notes 78-86.

Supreme Court, due process is a shadowy concept. The Supreme Court has stated, "For all its consequence, ‘due process’ has never been, and perhaps can never be, precisely defined." What is required is "fundamental fairness," which is a similarly obscure concept. The test for determining if due process rights have been violated is not very illuminating either. The Supreme Court has stated, "Applying the Due Process Clause is... an uncertain enterprise which must discover what ‘fundamental fairness’ consists of in a particular situation by first considering any relevant precedents and then by assessing the several interests that are at stake."

Given that the Supreme Court has not decided the juror questioning issue, any due process analysis of the topic is of questionable value. However, the Court has provided some guiding principles to follow relating to juror partiality (but not specific to juror questioning) that can be of useful.

In Smith v. Phillips, the Court stated: "Due process means a jury capable and willing to decide the case solely on the evidence before it, and a trial judge ever watchful to prevent prejudicial occurrences and to determine the effect of such occurrences when they happen." Also, "the remedy for allegations of juror partiality is a hearing in which the defendant has the opportunity to prove actual bias." The Court also indicated that juror bias must be shown, not just suspected or inferred by implication. Furthermore, the Constitution "does not require a new trial every time a juror has been placed in a potentially compromising situation... [because] it is virtually impossible to shield jurors from every contact or influence that might theoretically affect their vote."

In the absence of an outright ban on the practice, it appears that in order to demonstrate that a juror has become biased through asking questions of a witness, the proponent would need to prove actual bias on the part of that juror. Until such a showing is made, no due process violation is established. In Smith, a criminal defendant alleged that his due process rights had been violated because, during his trial, one of the jurors deciding the case applied to the prosecutor's office for a job. The Court did not find juror bias under the circumstances of that case. Although the determination of whether a juror is biased will depend upon the circumstances of the particular case, a juror's seeming alignment with one side seems to be a rather strong indication of bias. Nevertheless, the Court

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166. Id. at 24.
167. Id.
168. See id.
169. Id. at 24-25.
170. See Smith, 455 U.S. at 217.
171. Id.
172. Id. at 215.
173. Id.
174. Id. at 217.
175. Smith, 455 U.S. at 215.
176. Id. at 219.
177. Id.
repudiated the defendant’s claim.178 It seems that juror questioning opponents have an uphill battle in making this argument.

Opponents of juror questioning argue that the practice pits the interests of ascertaining truth and reliable verdicts against the interest in avoiding prejudice.179 Because the object of a trial is the attainment of justice, opponents argue, courts view the interest in avoiding prejudice as more important than the ascertainment of truth.180 In other words, fairness is preferred over truth in our courts.181 This author does not dispute that contention. However, there is no indication that juror questioning affects the fairness of a trial. Certainly, opponents of juror questioning argue that the practice causes jurors to become biased advocates. This mantra is recited, but evidence to support it is invariably missing.182 Just because attorneys pose questions to witnesses this does not mean that jurors who pose questions to witnesses will then start acting like attorneys. It should also be remembered that juror bias must be shown, not just suspected or inferred by implication.183 There has been no evidence to demonstrate that asking questions causes a jury to become less impartial.184

Besides pointing out the stunning lack of evidence put forward to support the constitutional argument that juror questioning violates due process, it is also worth noting that banning juror questioning would not necessarily put an end to biases held by jurors with inquiring minds. Prohibiting jurors from submitting questions will not prevent jurors from formulating questions in their own minds. The jurors’ questions will not be ended, but will simply be unasked and unanswered, and, in the case of a biased juror, unexposed.

C. Juror Questioning Does Not Violate the Seventh Amendment Right to Jury Trial

Opponents of juror questioning may argue that juror questioning violates the Seventh Amendment right to trial by jury.185 The Seventh Amendment states that the right to trial by jury “shall be preserved.”186 Thus, an argument can be made that allowing juror questioning constitutes an alteration in the right to jury trial, and that the Seventh Amendment is thereby violated on the theory that if something is altered, it is not “preserved.” However, this argument is likely to fail. The Seventh Amendment’s language of preservation does not require that the right to jury trial be forever unchanged in every possible respect. In Walker v.

178. Id.
179. E.g. Lundy, supra n. 105.
180. E.g. id.
181. E.g. id.
182. See e.g. Zima, 468 N.W.2d at 379-80; Morrison, 845 S.W.2d at 886; Bush, 47 F.3d at 515; Douglas, 81 F.3d at 326; Feinberg, 89 F.3d at 336; Groene, 998 F.2d at 696; Brockman, 183 F.3d at 899; Jeffries, 644 S.W.2d at 435; Williams, 484 S.E.2d at 155; Lundy, supra n. 105.
183. Smith, 455 U.S. at 215.
184. See text accompanying supra notes 161-63.
185. “In suits at common law . . . the right of trial by jury shall be preserved.” U.S. Const. amend. VII.
186. U.S. Const. amend. VII.
S.P.R.R. Co. Justice Brewer, considering whether a New Mexico Territory statute violated the Seventh Amendment, stated:

[The Seventh Amendment's] aim is not to preserve mere matters of form and procedure but substance of right. This requires that questions of fact in common law actions shall be settled by a jury, and that the court shall not assume, directly or indirectly, to take from the jury or to itself such prerogative. So long as the substance of right is preserved, the procedure by which this result shall be reached is wholly within the discretion of the legislature.

The principle function of the jury trial in criminal cases is to safeguard against government oppression of an accused. In criminal and civil cases, the purpose of the jury trial is to provide a fair resolution of the facts in issue. The Supreme Court has recognized that the Seventh Amendment

[Does not prohibit the introduction of new methods for determining what facts are actually in issue, nor does it prohibit the introduction of new rules of evidence . . . . New devices may be used to adapt the ancient institution to present needs and to make of it an efficient instrument in the administration of justice . . . . The limitation imposed by the Amendment is merely that enjoyment of the right of trial by jury be not obstructed, and that the ultimate determination of issues of fact by the jury be not interfered with.

In Colgrove v. Battin, the Supreme Court determined that a far more radical change of jury structure—the six-person jury in civil cases—did not violate the Seventh Amendment.

In determining whether permitting jurors to ask questions would violate the Seventh Amendment, the relevant question is whether that practice would affect the substance of the right to jury trial. Clearly, it does not. Juror questioning does not inhibit the jury from deciding questions of fact. Actually, permitting jurors to ask questions enhances the jury's role as factfinder in that jurors may seek clarification of points of confusion, thereby rendering better-reasoned decisions.

It is also worth noting the historical background of juror questioning in determining whether the practice fundamentally changes the jury trial from the manner in which it existed at the time of convention. Jurors were permitted to ask witnesses questions at common law. Also, the practice has been permitted in

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187. 165 U.S. 593, 596 (1897).
188. Id.
189. Colgrove v. Battin, 413 U.S. 149, 157 (1973) (citing Williams v. Fla., 399 U.S. 78, 99 (1970)). Quoting Duncan v. La., 391 U.S. 145 (1968), the Williams court stated, "Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the complaint, biased, or eccentric judge." Williams, 399 U.S. at 100.
190. Id. (citing Gasoline Prods. Co. v. Champlin Refining Co., 283 U.S. 494, 498 (1931)).
191. Ex Parte Peterson, 253 U.S. 300, 309-10 (1920) (emphasis added).
192. 413 U.S. 149.
193. Id. at 159.
194. See supra nn. 204, 207.
195. Wolff, supra n. 18.
the United States since at least the nineteenth century. In light of these facts, the argument that juror questioning would change jury trials to the extent that they are no longer "preserved" is unsound.

VI. CONCLUSION

In all but a slight minority of jurisdictions, courts have permitted juror questioning if courts abide by certain prophylactic procedures. Importantly, in only one of the few cases in which juror questioning led to reversible error were prophylactic procedures in use, and in that case the appellate court found the practice objectionable mainly because the trial court actively solicited questions from the jury.

The handful of cases in which prophylactic procedures were not used and, resultantly, in which juror questioning was improperly managed, does not warrant doing away with the practice, nor does it mandate by implication that all jurors will behave egregiously if permitted to ask questions. There has been no evidence to show that jurors adopt the role of advocate if they are permitted to ask questions. In fact, in the cases in which reversible error has occurred, juror questioning may have simply revealed juror biases, not created them. These cases provide no reason to dispense with juror questioning, but they do provide good reason to require prophylactic procedures whenever the practice is used.

Juror questioning has not led to a breakdown of the adversarial system, as some have predicted. Nor is it forbidden by the Constitution, as others have argued. Concededly, if juror questioning were allowed, unobstructed by rules to protect the judicial process, then juror questioning could indeed become a "procedure fraught with perils." However, this need not be so. Juror questioning has the promise of being very helpful to jurors in their role in the judicial system. The simple permission to ask a question can enhance jurors' understanding of the issues, the facts, and ultimately lead to better-reasoned decisions. As noted by one court, "Trials exist to develop the truth." Ascertainment of truth is not the only object of a trial, but it is certainly an object of a trial. A procedure that justly promotes attainment of this goal should not be too easily discarded.

Sarah E. West

197. Walker, 165 U.S. at 596.
198. See supra nn. 1, 3.
199. Ajmal, 67 F.3d at 15.
200. See supra notes 101-05 and accompanying text.
201. See text accompanying supra notes 106-07.
202. See supra notes 101-05 and accompanying text.
203. See supra pt. V.
204. Sutton, 970 F.2d at 1005.
205. Penrod & Heuer, supra n. 9, at 274-76
206. Hudson v. Markum, 948 S.W.2d 1, 2 (Tex. App. 5th Dist. 1998).